

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re Application of: STEIN, Allen R.)	
)	Conf. No. 6370
Serial No.: 10/829,552)	
)	Art Unit: 3634
Filing Date: April 22, 2004)	
)	Examiner: NEWTON, Jared W.
For: DISPLAY DEVICE)	
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Board of Patent Appeals and Interferences
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, Virginia 22313-1450

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APPEAL BRIEF UNDER 37 C.F.R. § 41.37

INTRODUCTION

This is an appeal to the Board of Patent Appeals and Interferences of the final rejection of Claims 1-20 in the subject application. A Notice of Appeal having been filed July 19, 2006, this Appeal Brief is believed to be timely filed. If any extension of time is required, please consider this is a request therefor. The requisite fee for this Brief is paid herewith. The Commissioner is authorized to charge any additional fees or credit any overpayment to Deposit Account No. 50-1513.

i. REAL PARTY IN INTEREST

The real party in interest is the owner and inventor of the present application, Allen R. Stein.

ii. RELATED APPEALS AND INTERFERENCES

There are no other known appeals, interferences or judicial proceedings that are related to, will directly affect, or be directly affected by, or have a bearing on the Board's decision in this Appeal.

iii. STATUS OF CLAIMS

Claims 1-20 are pending in the application. Claims 1-20 stand finally rejected. The appealed claims are Claims 1-20.

iv. STATUS OF AMENDMENTS

No amendments have been filed subsequent to final rejection. All amendments filed prior to final rejection have been entered.

v. SUMMARY OF CLAIMED SUBJECT MATTER

Independent Claims 1, 11 and 16 are directed to display devices for displaying samples of carpet, wallpaper, flooring or other materials on display panels that are mounted to a rack [Paragraph 0002, Fig. 1]. Display devices are commonly used in home-improvement and building supply stores to allow potential customers to see and feel samples of product they are considering purchasing, to compare different products, convey information about the product, and allow salespersons to explain product features [Paragraphs 0003-0004, 0007].

The Applicant discovered that the customer impact of many previously known display devices was somewhat limited, particularly in their ability to draw customers in and encourage them to consider samples of material positioned on the underlying panels of a display device. Typically, since all of the panels of a display device were of the same general size and shape, overlying panels substantially obscured a potential customer's view of underlying panels and the materials displayed thereon [Paragraph 0004]. Many customers who are "just looking" will not put forth the time and effort to flip

though an array of display panels to see what products may be obscured by the overlying panels, or may not even approach a display if material they might be interested in is hidden from view by materials they are not interested in [Paragraph 0004].

The display device of Claim 1 addresses this shortcoming by enhancing the visibility of those product samples mounted on underlying display panels. The enhanced product visibility helps draw customers in, exposes the customer to a wider array of product samples, and allows salespersons to better engage the customer [Paragraph 0007]. The claimed device includes a plurality of display panels [ref. nos. 14 in Fig. 1] mounted to a rack, with at least one of the panels being hinged and pivotally movable between a first position overlying a portion of another panel, and a second position not overlying the other panel [Paragraphs 0008, 0019, Fig. 1]. Each of the panels includes a free edge distal the rack, wherein the free edge of each panel extends beyond the free edges of any overlying panel(s) when the panels are in the first position [Paragraph 0008]. A sample of material [ref. no. 22 in Fig. 1] is mounted on each of the panels, and extends "to the free edge" of the panel it is mounted on [Paragraph 0008]. As a result, a substantial portion of the product samples mounted on underlying display panels is visible to potential customers, even with an overlying panel positioned over the underlying panel [Paragraph 0022].

The display device of independent Claim 11 enhances customer impact by providing a "story-board" [ref. no. 19 in Fig. 1] extending laterally from the body of the rack to which display panels are mounted [Paragraphs 0009, 0018, 0020, Fig. 1]. The story-board typically includes additional material samples, product information, marketing literature and/or decorative effects targeted to potential customers [Paragraph 0018]. Importantly, the story-board is ordinarily only "partially visible" to the customer [Paragraph 0024]. Because part of the story-board is obscured behind the display panels, a customer positioned in front of the display device is subliminally drawn to the display device, and encouraged to flip through the display panels to discover what information on the story-board was previously obscured from his/her view by the overlying panels [Paragraph 0024]. This provides a salesperson with a natural opening

to engage the customer [Paragraph 0024]. Also, once a customer has invested the time and effort into investigating what is found on the story-board, they may be more receptive to making a purchase [Paragraph 0024].

The display device of independent Claim 16 includes the combination of first and second arrays of pivotally mounted display panels [ref. nos. 14a-14f of Fig. 1 comprising a first array and ref. nos. 14a'-14f' comprising a second array]; wherein underlying display panels of each array have free edges with material samples [ref. no. 22] thereon extending beyond the free edges of overlying display panels; and further including story-board portions [ref. no. 19], which are partially visible behind each of the first and second arrays of display panels [Paragraph 0010]. Because portions of underlying material samples extend beyond the free edges of overlying display panels, potential customers are exposed to underlying product samples, even without flipping through the panels [Paragraph 0022]. And otherwise disinterested customers may be drawn in to investigate what is to be found on the partially obscured story-boards [Paragraph 0024].

No claim involved in the appeal includes means-plus-function or step-plus-function language under 35 U.S.C. §112, sixth paragraph.

vi. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

The following grounds of rejection are presented for review:

- (1) The rejection of Claims 1-4, 10-17, and 19 under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. Des. 249,000 to Simmons.
- (2) The rejection of Claims 5 and 20 under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. Des. 249,000 to Simmons as applied to Claims 1 and 16.

vii. ARGUMENT

Claims 1-10:

The rejection of Claim 1 under 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. Des. 249,000 to Simmons, cannot stand because Simmons does not teach every element of the claimed invention. Mehl/Biophile International Corp. v. Milgraum, 192 F.3d 1362, 1365 (Fed. Cir. 1999) ("To anticipate, a single reference must teach

every limitation of the claimed invention."). In this instance, the reference cited by the Examiner fails to teach a number of elements of the Applicant's claimed invention.

For example, Claim 1 recites "a plurality of display panels *detachably* mounted to said rack, at least one of said plurality of display panels being a *hinged* panel *pivotally* movable between a first position...and a second position" (emphasis added). The Examiner seemingly acknowledges that Simmons does not expressly disclose a hinged panel pivotally mounted to a display rack, stating instead that Simmons only "*suggests*" such an arrangement. Office Action of 5/30/2006, p.8. But a rejection under §102 requires a disclosure or teaching of each element of the claimed invention, not merely a suggestion.

And in fact, the Examiner does not point to any actual teaching or disclosure of a pivotal connection in the Simmons reference. Instead, the stated grounds of rejection relies on a "pin-and-slot arrangement" inferred by the Examiner from Figure 4 of the Simmons reference, which is asserted in support of the suggestion that Simmons' panels might be hingedly attached. Office Action of 5/30/2006, pp. 8, 14. The Examiner's annotated drawing is reproduced below:

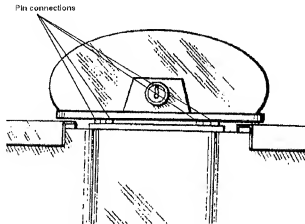


FIGURE 2E. Close up of FIG. 4 (Simmons)

(The "Pin connections" annotation in this drawing was added by the Examiner, and is not part of the Simmons reference).

But the asserted "suggestion" of a hinged or pivotal connection is not supported by the actual content of the Simmons reference. See MPEP §2125 (patent drawings can only be used to anticipate claims if they clearly show the structure which is claimed, and must show all the claimed structural features and how they are put together); see also In re Mraz, 455 F.2d 1069 (CCPA 1972); Jockmus v. Leviton, 28 F.2d 812 (2d Cir. 1928). While it is not clear from the above drawing whether or not the referenced lines of the figure are "pin connections", it is abundantly clear that whatever those lines represent, the panels are not pivotally mounted thereto. With reference to Figure 3 of Simmons (reproduced below), it can be seen that the lines alleged by the Examiner to be "pin connections" in the figure above are horizontally positioned too near the outer edges of the rear support to align with the points of connection of the panels:

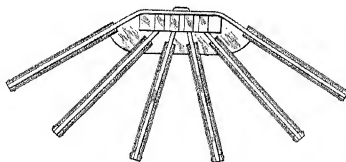


FIG. 3

Since the actual location of the points of connection of the panels to the rear support do not align with the lines on the drawing asserted by the Examiner to be "pin connections", it seems clear that Simmons merely teaches a display stand having six fixed panels spaced at substantially equal angular distances from each other.

The Simmons reference also fails to teach display panels that are "detachably mounted" to a display rack, and the Examiner has failed to identify any teaching or disclosure of this element of the claimed invention.

Nor does Simmons disclose display panels having "a material sample mounted thereon", as claimed. Although the title and claim of the Simmons reference refer to "jewelry chain", there is no disclosure of any jewelry or other material samples actually

mounted on the panels. And considering the nature of jewelry chain, it seems more likely that such material samples would be hung from the panels, rather than be mounted to a panel as presently claimed. It is improper to resort to speculation or hindsight reconstruction to supply deficiencies in the factual basis for a rejection. See In re Warner, 379 F.2d 1011, 1017 (CCPA 1967).

Finally, and importantly, Claim 1 recites "each said material sample extending to the free edge of the panel it is mounted on." Even if the Board disagrees with the above arguments that Simmons does not teach material samples mounted to a display panel, the reference clearly does not teach any material samples that extend *to the free edge of the panel*, as claimed. The Examiner has construed "free edge" to include any point on the panel more toward a distal end of the panel than the vertical centerline of the panel. Office Action of 5/30/2006, pp. 10-11. This claim construction, however, is clearly contrary to the ordinary meaning of the claim language as it would be understood by one of ordinary skill in the art. See MPEP §2111 (claim terms should be given their broadest reasonable interpretation "consistent with the interpretation that those skilled in the art would reach"); and MPEP §2111.01 ("words of the claim must be given their plain meaning unless applicant has provided a clear definition in the specification"); See also In re Zletz, 893 F.2d 319, 321, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989); Chef America, Inc. v. Lamb-Weston, Inc., 358 F.3d 1371, 1372, 69 USPQ2d 1857 (Fed. Cir. 2004) (Ordinary, simple English words whose meaning is clear and unquestionable, absent any indication that their use in a particular context changes their meaning, are construed to mean exactly what they say.)

The plain meaning of the term "edge" would be understood by one of ordinary skill in the art to mean: a line or border at which a surface terminates; or a line at which two surfaces of a solid object meet. Dictionary.com Unabridged (v 1.0.1), based on the Random House Unabridged Dictionary (Random House, Inc. 2006). The Applicant's specification and drawings do not disavow or rebut the ordinary meaning of the claim language, and it is improper to import limitations from the specification that are not part of the claim language. Superguide Corp. v. DirecTV Enterprises, Inc., 358 F.3d 870, 875, 69 USPQ2d 1865, 1868 (Fed. Cir. 2004) ("Though understanding the claim

language may be aided by explanations contained in the written description, it is important not to import into a claim limitations that are not part of the claim.”).

It is readily apparent that the panels of Simmons do not have material samples that extend “to the free edge”, as presently claimed. The Examiner, in fact, acknowledges that what are asserted to be the material samples of Simmons extend only to a point on the panels “between a center vertical line and a distal-most edge of the panel.” Office Action of 5/30/2006, p. 11.

Because the Simmons reference fails to disclose the above-noted claim limitations, it is respectfully submitted that the rejection of Claim 1 under 35 U.S.C. §102(b) cannot properly be maintained, and must be overturned on appeal. Accordingly, the rejection of Claims 2-4 and 10 under 35 U.S.C. §102(b); and of Claims 5-9 under 35 U.S.C. §103, in view of Simmons alone (Claim 5), in view of Simmons and Rutledge (Claims 6 and 7), in view of Simmons and Ehrlich (Claim 8), and in view of Simmons and LaFleur (Claim 9), also cannot stand, at least by reason of these claims’ dependence from Claim 1.

Claims 11-15:

The rejection of Claim 11 under 35 U.S.C. §102(b) as being anticipated by U.S. Patent No. Des. 249,000 to Simmons also cannot stand because Simmons does not teach every element of this claim. For example, Claim 11 recites a “story-board extending laterally from said body panel”, in combination with an array of display panels, such that the story-board “is only partially visible behind the array of display panels to an observer positioned in front of the display device with the array of display panels between the observer and the story-board.” Simmons does not disclose any story-board, as presently claimed.

The Examiner asserts that the two outermost panels of the Simmons display stand read on Applicant’s claimed story-board. Office Action of 5/30/2006, p. 11. But Simmons’ outermost panels cannot properly be considered “story-boards”, as claimed, for a number of reasons. First, there is no teaching or suggestion that Simmons’ panels include any product information, marketing literature or other information thereon that

might tell a product's "story" to potential customers, as one of ordinary skill in the art would understand Applicant's "story-board" claim limitations to require.

Also, the language of Claim 11 specifies that the story-board extend laterally from a body panel of the rack, and be only partially visible behind the display panels, which limitations are not met by the Simmons reference. Simmons' outermost panels cannot properly be considered to be "only partially visible behind" the panels, because they *are* the panels. Six panels are shown in the Simmons reference, and the two outermost panels share the same general appearance and structure as the remainder of the panels. As such, it is improper to consider these two panels to be anything other than what they are—namely, panels.

Because the Simmons reference fails to disclose or suggest these features of Applicant's claimed invention, it is respectfully submitted that the rejection of Claim 11 under 35 U.S.C. §102(b) cannot properly be maintained, and must be overturned on appeal. And because of their dependence from Claim 11, Claims 12-15 are likewise patentable.

Claims 16-20:

The rejection of Claim 16 under 35 U.S.C. §102(b) cannot stand because Simmons does not teach every element of the claimed invention. Independent Claim 16 recites first and second arrays of display panels "pivotally mounted" to a rack. As detailed above with respect to Claim 1, the Simmons reference does not disclose or suggest that its panels are pivotally mounted.

Claim 16 also recites that the display panels have "material samples thereon". As detailed above with respect to Claim 1, the Simmons reference does not disclose any material samples on its panels.

Claim 16 also recites that the material samples extend "beyond free edges of overlying display panels", which as detailed above with respect to Claim 1 is not disclosed or suggested by the Simmons reference.

Claim 16 also recites "story-board portions of the rack . . . partially visible behind each of the first and second arrays of display panels". As detailed above with respect to

Claim 11, these claim limitations are not disclosed or suggested by the Simmons reference.

Because the Simmons reference fails to disclose or suggest these claim limitations, it is respectfully submitted that the rejection of Claim 16 must be overturned on appeal. Additionally, the stated grounds of rejection of Claims 17-20 cannot stand, at least by reason of these claims' dependence from Claim 16.

Claims 3 and 17:

The rejections of Claims 3 and 17 under 35 U.S.C. §102 in view of Simmons are argued separately. Claim 3 recites that "each of said plurality of display panels is wider than an adjacent overlying one". Claim 17 recites that "underlying display panels...are progressively wider than adjacent overlying display panels." Simmons does not disclose or suggest these claim limitations.

The Examiner acknowledges that both the 1st and 4th panels and the 2nd and 3rd panels of Simmons have equal width but contends that the 1st and 4th panels are wider than the 2nd and 3rd panels. Office Action of 5/30/2006, p. 12. While the Applicant does not necessarily agree that the 1st and 4th panels of Simmons are wider than the 2nd and 3rd panels (they appear to be about the same width, and MPEP §2125 discounts reliance on dimensions in patent drawings), this is immaterial since Claims 3 and 17 require that *each* underlying display panel be wider than an overlying display panel, which cannot be satisfied by Simmons if its 2nd and 3rd panels are of equal width.

Claims 5 and 20:

The rejections of Claims 5 and 20 under 35 U.S.C. §103 in view of Simmons alone are argued separately. Claims 5 and 20 include limitations requiring that the size of the material samples displayed on the panels increases with the cost of the material. There is no disclosure or suggestion of this feature of the claimed invention, either in the Simmons reference or in the knowledge generally available to one of ordinary skill in the art.

The assertions on page 12 of the Office Action of 5/30/2005, that (1) "it is well known and obvious that a larger portion of a certain material will under almost any

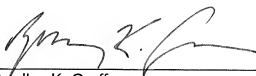
circumstance, cost less than a smaller portion of the same material"; and (2) "the larger material sample shown on the 1st panel [of Simmons] . . . will undoubtedly cost more than the smaller material sample shown on the 2nd panel", seem contradictory. But regardless, no reference is cited in support of either position.

Moreover, the claim language is clear that it is not the cost of the "sample", but rather the cost of the "material" that increases along with increasing sample size. In other words, larger sample sizes are displayed for materials with a higher unit cost (e.g. dollars per square foot). As explained in Paragraphs [0007], [0023] and [0032] of the specification, this may assist in "up-selling" a customer because of a perceived higher material value. But in fact, using a bigger sample of a material with a higher unit cost is counterintuitive from a purely economic standpoint, and the claimed invention would therefore not be obvious.

Conclusion

In view of the arguments presented herein, it is respectfully submitted that the indicated grounds of rejection must be overturned, and all claims allowed.

Respectfully submitted,



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viii. CLAIMS APPENDIX

1. A display device comprising:

a rack comprising a fixed body panel;

a plurality of display panels detachably mounted to said rack, at least one of said plurality of display panels being a hinged panel pivotally movable between a first position overlying a portion of another of said plurality of panels, and a second position not overlying the other panel, each of said plurality of panels comprising a free edge distal said rack, wherein the free edge of each of the plurality of display panels extends beyond the free edges of any overlying panels when the panels are in the first position; and

each of said plurality of display panels having a material sample mounted thereon, each said material sample extending to the free edge of the panel it is mounted on.

2. The display device of Claim 1, wherein each of said plurality of display panels is mounted to the rack at a position horizontally offset from an adjacent one of the plurality of display panels.

3. The display device of Claim 1, wherein each of said plurality of display panels is wider than an adjacent overlying one of the plurality of display panels.

4. The display device of Claim 3, wherein the size of the material samples displayed on the panels increases with the size of the display panels.

5. The display device of Claim 1, wherein the size of the material samples increases with the cost of the material.

6. The display device of Claim 1, wherein each material sample is a sample of floor covering material.

7. The display device of Claim 6, wherein the floor covering material is carpeting.

8. The display device of Claim 1, wherein each material sample is a sample of wall covering material.

9. The display device of Claim 1, wherein said rack comprises a story-board extending at least partially beyond peripheral edges of the plurality of display panels, said story-board displaying information directed to potential purchasers of material displayed on the device.

10. The display device of Claim 1, wherein a first plurality of display panels is mounted to a first side of said rack, and a second plurality of display panels is mounted to a second side of said rack.

11. A display device comprising:

a rack having a base, a body panel extending generally upright from said base, and a story-board extending laterally from said body panel; and

an array of display panels mounted to said rack and overlying a portion of the story-board such that said story-board is only partially visible behind the array of display panels to an observer positioned in front of the display device with the array of display panels between the observer and the story-board.

12. The display device of Claim 11, wherein each of the display panels of said array is hingedly mounted to the rack, whereby the display panels can be pivotally moved between a first position supported against said story-board and a second position wherein substantially the entire story-board is visible.

13. The display device of Claim 12, wherein each of the display panels of said array has a free edge distal said rack and a material sample mounted thereon, the material sample extending substantially to the free edge of the panel.

14. The display device of Claim 11, wherein the rack has a first story-board extending laterally from a first side thereof, and a second story-board extending laterally from a second side thereof.

15. The display device of Claim 14, comprising a first array of display panels mounted to said rack and overlying a portion of the first story-board such that said first story-board is only partially visible behind the first array of display panels, and a second array of display panels mounted to said rack and overlying a portion of the second story-board such that said second story-board is only partially visible behind the second array of display panels.

16. A display device comprising a first array of display panels pivotally mounted to a first side of a rack, and a second array of display panels pivotally mounted to a second side of the rack, wherein underlying display panels of each of the first and second arrays have free edges with material samples thereon extending beyond free edges of overlying display panels, and wherein story-board portions of the rack are partially visible behind each of the first and second arrays of display panels.

17. The display device of Claim 16, wherein underlying display panels of each of the first and second arrays are progressively wider than adjacent overlying display panels.

18. The display device of Claim 17, wherein underlying display panels of each of the first and second arrays are progressively taller than adjacent overlying display panels.

19. The display device of Claim 16, wherein each display panel is pivotally mounted to the rack at a position horizontally offset from an adjacent display panel.

20. The display device of Claim 16, wherein the size of the material samples displayed on the display panels increases with increasing material cost.

ix. EVIDENCE APPENDIX

(none)

x. RELATED PROCEEDINGS APPENDIX

(none)
